UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 443686 and
MERCHANT MARINER'S DOCUMENT NO. Z 85548-D1
Issued to: William Gilbert Burke

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2181

William Gilbert Burke

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 14 February 1978, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, after a hearing at Galveston, Texas, on various dates between 31 May 1977 and 6 January 1978, revoked the captioned documents upon finding Appellant mentally incompetent. The original specification of mental incompetence found proved alleges that Appellant, while serving as second mate aboard SS MISSOURI, on or about 3 November 1973, while the vessel was at sea, was, and presently is, mentally incompetent to perform the duties for which he holds a license and document issued by the Coast Guard.

This hearing was conducted pursuant to the order of the National Transportation Safety Board No. EM-51, 2 NTSB 2784(1976).

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced into evidence three documents.

In defense, Appellant introduced into evidence one document, and submitted an affidavit, after the close of the hearing, for consideration by the Administrative Law Judge.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification as alleged had been proved he then entered an order of revocation.

The decision was served on 22 February 1978. Appeal was timely filed on 15 March 1978, and perfected on 9 November 1978.

FINDINGS OF FACT

The facts previously found proved in this case need not be repeated here. See, Decision On Appeal No. 2021, as modified, 2 NTSB 2784(1976). Subsequent to remand by the National Transportation Safety Board, the hearing was reconvened. Pursuant to an agreement reached among the parties and the Administrative Law Judge, Appellant was examined at the U.S. Public Health Service Hospital, Baltimore, Maryland, by the Deputy Chief of Psychiatry, who prepared an initial consultation report and, several days later, a separate "Addendum" to it. Both reports were admitted into evidence during Appellant's hearing.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. Appellant contends that the decision of the Administrative Law Judge to revoke Appellant's merchant mariner's document was clear error, in that the order of the National Transportation Safety Board precluded reconsideration of Appellant's fitness for duty under his merchant mariner's document and the order of the Administrative Law Judge revoking Appellant's merchant mariner's document was not supported by substantial evidence. Appellant further contends that the order of the Administrative Law Judge revoking Appellant's license was clear error in that admission into evidence of the reports of the examining physician at the Baltimore Public Health Service Hospital was error and there was not substantial evidence to support revocation of Appellant's license.

APPEARANCE: Mandell & Wright, Houston, Texas, by Eliot P. Tucker, Esq.

OPINION

I

Appellant contends that the order of the National Transportation Safety Board (NTSB) precluded reconsideration by the Administrative Law Judge of Appellant's fitness to hold a merchant mariner's document. Appellant reasons that the effect of that order was to terminate proceedings with respect to his fitness to hold a document, although leaving open the question of Appellant's fitness to hold a license.

In support of his argument, Appellant cites Briggs v. Pennsylvania R. Co., 334 U.S. 304 (1948), for the proposition that

"[i]t is well settled law that the mandate of an appellate court must be followed by a trial court," and In Re United States, 207 F. 2nd 567 (1953) for the proposition that "whatever was before the appellate court and disposed of it[sic] by its order is finally settled and becomes the law of the case." Appellant further argues that these propositions apply "with equal force to remands within administrative agencies. In Retail Clerks Union v. N.L.R.B., 436 F.2nd 316(D.C. Cir.1972), the court held that doctrines such as law of the case and estoppel by judgment apply to administrative agencies. Thus, in revoking the document after the remand, the administrative law judge exceeded his authority as limited by the Board's order."

Although Appellant's construction of the NTSB order is not wholly without merit, for several reasons I must reject it.

The order itself, and the opinion preceeding it, do not evidence clearly the intent of the NTSB to attempt subsequent Coast Guard proceedings to consideration of only the question of Appellant's fitness to hold a license. For example, in its opinion, the Board stated, "[t]he sanction will be modified and the case remanded for a redetermination of appellant's current state of fitness for sea duty." (emphasis added) 2 NTSB 2784, 2785. Moreover, it appears that the Board, in vacating the order of revocation of Appellant's merchant mariner's document, was influenced considerably by an extant order of a Federal District Court, and decided to fashion its own order to most nearly conform to that already issued by the court. In light of these factors, I am unable to conclude that the Board did intend to limit the scope of further proceedings to only the question of Appellant's right to hold a license.

Buttressing this construction of the Board's order is my belief that the Board was quite aware of the well-established principle of Administrative Law, that upon vacation of an agency order and remand, the agency is free to conduct additional proceedings, upon the original charges, to correct defects noted in the prior proceedings. United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965); Ford Motor Company v. NLRB, 305 U.S. 364 (1934); Erie R. Co. v. United States, 64 F. Supp. 162 (S. D. Ohio 1945); Tamiami Trail Tours Inc. v. R. Commission, 174 So. 451 (Fla. 1937); Adams v. City of Anadarko, 210 P.2d 151 (Okla. 1949); Rock Island Motor Transit Co. v. Murphy Motor Freight Lines, Inc., 58 NW2d 723 (Minn.1953); Plainfiel-Union Water Co. v. Borough of Mountainside, 102 A2d 1 (N.J. 1954). Hence, Appellant's right to hold both a license and a document, the subject of the original charge, continued to be at issue. (Parenthetically, I might add that the letter of the Chief Counsel of the Coast Guard directing the Administrative Law Judge to "reopen the matter," provided that

"the proceeding will be open to the submission of motions, evidence, and the like as if neither party had rested prior to submission of the matter for initial decision." Upon commencement of the reopened hearing, the Administrative Law Judge "[t]his hearing is concerned only with your client's right to continue to hold the license and/or document issued to him by the Coast Guard." (emphasis added). R.3. Until now, Appellant has not questioned the authority of the Coast Guard to proceed against the document and the license. Thus, although the question is jurisdictional in nature and therefore appropriately may be raised for the first time upon appeal, it cannot be said that Appellant was misled into believing that his right to hold a merchant mariner's document was not at issue during the reopened hearing).

Appellant's contention as to the strict applicability of the principles of the "law of the case" and "estoppel by judgment" evidences his misunderstanding of their proper application in the administrative setting. Briggs v. Pennsylvania R. Co., and In Re United States each stand for the proposition propounded by Appellant; nevertheless, because each involved solely the relationship between superior and inferior courts, not that between agency and reviewing authority, each is inapposite. Neither is Appellant's citation to Retail Clerk's Union v. N.L.R.B. any more persuasive. Not only did the court in Retail Clerks not hold that "doctrines such as law of the case and estoppel by judgment apply to administrative agencies," but, in the same paragraph of dictum to which Appellant refers, the court flatly stated, "[t]hese doctrines and concepts have a rightful and reasonable application to the working of administrative agencies. They are not to be applied mechanically so as to transplant what is right for the judicial system into a binding requirement that will not thrive in the different conditions of agency operations." 463 F2nd 316, 322.

"[T]o assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine. "F.C.C. v. Pottsville Broadcasting Co., 309 U.S.134 (1940), 144.

The correct principle is that once a reviewing court has corrected errors of law, the agency, upon remand and reconsideration, is bound in its further proceedings to act in accordance with the law as determined by the court. F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374 (1965); F.P.C. v. Pacific Co.,

307 U.S. 156 (1939); Ford Motor Co. v. N.L.R.B., supra. That an administrative agency is not free simply to ignore entirely the decision after review is clear. City of Cleveland v. F.P.C., 561 F.2nd 344 (D.C. Cir. 1977); Mefford v. Gardner, 383 F.2nd 748 (6th Cir. 1967); Morand Brothers Beverage Co. v. N.L.R.B., 204 F.2nd 529 (7th Cir. 1953). Nevertheless, "an Administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." F.C.C. v. Pottsville Broadcasting Co., 309 U.S.134, 145.

The NTSB, during the relatively short time that it has been empowered to review my decisions upon appeal, has not addressed this question. I am confident, however, that the Board did not intend to attempt to disturb this well-established allocation of functions between agency and reviewing entity. Hence, upon remand, the charge remained in effect without modification, and the Coast Guard was free to proceed "as if neither party had rested prior to submission of the matter for initial decision."

II

Appellant contends that it was improper to admit into evidence the two medical reports (initial report and "addendum") prepared at the Baltimore Public Health Service Hospital because (1) the reports were hearsay; (2) Appellant had no opportunity to cross-examine the physician who prepared them; and, (3) the Coast Guard failed to offer evidence of the physician's qualifications. I reject this contention of Appellant's.

Pursuant to the Federal business records exception to the hearsay rule, codified at 28 U.S.C. 1732, the initial medical report and "addendum" were admitted properly as exceptions to that rule. Thomas v. Hogan, 308 F.2nd 355 (4th Cir. 1962).

Although the physician who prepared the two disputed reports was not available for cross-examination at the hearing, the Administrative Law Judge did provide Appellant with ample opportunity to depose him, either in person or by written interrogatories. Appellant initially accepted this proposal of the Administrative Law Judge, but subsequently declined to purpose it. Nevertheless, there is no reason to doubt the veracity of the examining physician (especially in light of elaborate precautions taken to insure physician's "impartiality"). Hence, the lack of cross-examination properly could have been considered in establishing the evidentiary weight to be accorded the reports, but it was not sufficient reason to preclude admitting them into evidence under the business records exception.

Appellant's objection with regard to the medical qualifications of the physician who prepared the two reports was not raised at the time they were offered for admission into evidence. Appellant first asserted this objection as part of his closing argument, well after the Investigating Officer had rested. In such circumstances, the "objection" should be deemed waived. In any event, I am satisfied that the examining physician, identified as the "Deputy Chief of Psychiatry." does possess satisfactory qualifications.

III

Appellant argues that the record does not contain substantial evidence to support an order revoking either Appellant's license or Appellant's merchant mariner's document. However, the record contains evidence sufficient to establish that Appellant currently suffers from what is diagnosed as "paranoid schizophrenia, in remission." It is further established that Appellant has suffered what apparently were "psychotic breaks," severe enough to require hospitalization on two occasions and to require his relief from duty aboard a vessel on a third occasion. Lastly, the diagnosis of current remission is said to mean "that the psychotic state is inactive at the present time, but the psychotic episodes have a tendency to recur in this patient. [Appellant's] risk of a future psychotic break cannot be stated in percentage form but it can be said to be greater than that of a person who has no history of mental illness."

One question present itself. Does Appellant suffer from an impairment of sufficiently disabling character to support a finding that he is not competent to perform <u>safely</u> duties aboard a merchant vessel of the United States? If the answer to this question is "yes," then revocation of all licenses and documents is the only proper sanction.

I conclude that the answer to this question is "yes." I am satisfied that Appellant has not suffered a serious relapse since his last "psychotic break." Yet, he currently and clearly does suffer from a serious mental illness. As characterized by the medical report of the examining physician at the Baltimore Public Health Service Hospital, and as evidenced by Appellant's medical history of recurrent mental relapses, the risk that Appellant will again suffer another debilitating "psychotic episode" is of such significance as to preclude a finding that Appellant can be

expected to perform duties aboard a merchant vessel of the United States without substantially endangering the lives of those aboard, and the vessel itself.

Revocation of both license and document is appropriate. Appellant's mental incompetence is not such that it only affects his ability to perform certain professional skills. C.f., 46 CFR 5.20-170 (d) ("When an administrative law judge determines that the person charged is professionally incompetent in the grade of the license, certificate or document he holds, but is considered competent in a lower grade, the administrative law may revoke the license, certificate or document and order the issuance of one of the lower grade.") Upon suffering a relapse, the effect of Appellant's schizophrenia is such as to preclude his safely performing any duties aboard a vessel. Revocation, rather than an indefinite suspension, required when mental incompetence is found proved because there is no provision in the statute, R.S. 4450, as amended (46 U.S.C. 239), or the regulations issued thereunder, for issuing a suspension order of indefinite duration. An Administrative Law Judge is required, when he issues an order of suspension, to issue it for a "specified period." 46 CFR 5.20-170(e); Decision on Appeal No. 2162. In several cases where mental incompetence was found proved, I affirmed orders of suspension because of my policy of not increasing the severity of an order upon appeal, [See, Decisions on Appeal Nos. 570, 570, 1502, 2162], but never have I condoned the issuance of such orders. See, Decision on Appeal Nos. 897, 1086, 1169, 1502, 1677. In the interest of promoting the safety of life and property at sea, I have adopted this strict policy of requiring revocation of all licenses and documents when mental incompetence is found proved. Because the determination of policy in administering a statute is properly the function of the agency charged with executing the statutory mandate, [F.T.C. v. Colgate-Palmolive Co., supra; F.C.C. v. Pottsville Broadcasting Co., supra; Greater Boston Television Corp. v. F.C.C., 444 F.2d 844, (D.C. Cir.1970), cert. denied, 403 U.S. 923(1971); reh. denied, 404 U.S. 877(1971)], and because the fashioning of remedies to carry out that policy also is the responsibility of the agency itself, not a reviewing authority, [N.L.R.B. v. Food Store Employees Union, Local 347, 417 U.S. 1 (1974)], I need say nothing further about this matter than that I shall not be the one to permit Appellant, or anyone suffering from a disability such as his, to serve aboard any vessel, whether in port or at sea, in any capacity in which he could cause serious harm to himself, to others, or to the vessel itself.

ORDER

The order of the Administrative Law Judge, dated at Houston, Texas, on 14 February 1978, is AFFIRMED.

J. B. HAYES
Admiral, U. S. Coast Guard
Commandant

Signed in Washington D.C., this 11th day of Feb 1980